IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellee,

-vs-

SC: 122849
COA: 213041
Shiawassee CC: 97-000369-CK

ROBERT DANIEL MCCARN, a Minor; ERNEST WARD MCCARN; PATRICIA ANN MCCARN,

Defendants,

and

NANCY S. LABELLE, Personal Representative of the Estate of KEVIN CHARLES LABELLE, Deceased

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BRIEF ON APPEAL – APPELLEE
ORAL ARGUMENT REQUESTED

Respectfully submitted,

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Dated: January 20, 2004

TABLE OF CONTENTS

INDEX OF AUTHORITIES

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE BODILY INJURY SUSTAINED BY KEVIN CHARLES LaBELLE WAS CAUSED BY THE INTENTIONAL OR CRIMINAL CONDUCT OF ROBERT DANIEL McCARN?

The Trial Court answered, "No".

The Court of Appeals, on Remand, answered, "Yes".

Appellee Allstate Insurance Company contends that the answer should be, "Yes".

Appellant LaBelle contends that the answer should be, "No".

II. WHETHER THE BODILY INJURY SUSTAINED BY KEVIN CHARLES LABELLE COULD REASONABLY BE EXPECTED TO RESULT FROM THE INTENTIONAL OR CRIMINAL CONDUCT OF ROBERT DANIEL McCARN?

The Trial Court answered, "No".

The Court of Appeals, on Remand, answered, "Yes".

Appellee Allstate Insurance Company contends that the answer should be, "Yes".

Appellant LaBelle contends that the answer should be, "No".

COUNTER-STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

A. NATURE OF THE ACTION

This is a Declaratory Judgment Action brought by Plaintiff/Appellee, ALLSTATE INSURANCE COMPANY, to determine that its policy of insurance issued to Defendants, ERNEST WARD McCARN and PATRICIA ANN McCARN, does not afford liability coverage for the events of December 15, 1995 (see Plaintiff's Complaint, Appellant's Appendix on Appeal, pages 10a-20a).

On December 15, 1995, Defendant, ROBERT DANIEL McCARN, and KEVIN CHARLES LaBELLE were alone in the home of Defendants, ERNEST WARD McCARN and PATRICIA ANN McCARN, grandparents of ROBERT (see State Police Investigation Report, Appellant's Appendix on Appeal, pages 155a-160a).

The two boys went to an upstairs bedroom where Defendant, ROBERT McCARN'S .410 shot gun was kept. ROBERT McCARN retrieved the gun from under his grandfather's bed. McCARN testified that he was not permitted to get the gun out or use it when his grandfather was not home. (See Deposition Transcript of Robert McCarn, Appellant's Appendix on Appeal, pages 45a, 59a).

Immediately preceding this casualty, McCARN and LaBELLE had smoked marijuana. (See Deposition Transcript of Robert McCarn, Appellant's Appendix on Appeal, pages 53a, 54a). After retrieving the gun, they became involved in an argument over some crackers. McCARN testified that he asked LaBELLE to give him the crackers and that LaBELLE refused. McCARN then pointed the shotgun at LaBELLE's face when they were approximately one foot apart. He pulled the hammer of the shotgun back, pulled the trigger and discharged the weapon. McCARN took absolutely no steps, whatsoever, to

determine whether or not the gun was loaded before pulling the trigger. (See Deposition Transcript of Robert McCarn, Appellant's Appendix on Appeal, pages 59a, 60a, 62a, 65a, 66a and 73a).

By his own testimony, McCARN admitted using a firearm to intimidate LaBELLE immediately preceding the discharge of the weapon. Following this incident McCARN was charged with a violation of MCL 750.329. That statute reads, in pertinent part, as follows:

> Any person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be guilty of the crime of manslaughter. (emphasis supplied).

Defendant, ROBERT DANIEL McCARN, pled no contest to a violation of the above statute in the Shiawassee County Probate Court on May 16, 1996 (Order of Adjudication, Appellee's Appendix, page 1b; Deposition of McCarn, page 5, Appellant's Appendix, page 25a)

As Justice Young noted in his dissenting Opinion, the conduct of DANIEL McCARN would also constitute felonious assault pursuant to MCL 750.82 (Allstate Insurance Company v McCarn, 466 Mich 277, 301 [2002] at Footnote 10) as well as simple assault (MCL 750.81).

Defendant/Appellant, NANCY S. LaBELLE, Personal Representative of the Estate of KEVIN CHARLES, LaBELLE, Deceased, filed a Complaint essentially alleging a claim for damages for the wrongful death of KEVIN CHARLES LaBELLE against Defendants, ROBERT DANIEL McCARN, ERNEST WARD McCARN and PATRICIA ANN McCARN, which was assigned Shiawassee County Circuit Court File No. 96-6030-

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NO. As a result of that Complaint, Defendants McCARN made demand on Plaintiff/Appellee, ALLSTATE INSURANCE COMPANY, to provide a defense and indemnity pursuant to a policy of insurance issued by Plaintiff/Appellee to Defendants, ERNEST WARD McCARN and PATRICIA ANN McCARN. Plaintiff/Appellee, ALLSTATE INSURANCE COMPANY, undertook the defense pursuant to a reservation of rights.

ALLSTATE INSURANCE COMPANY then instituted a Declaratory Judgment Action within the Shiawassee County Circuit Court as is more fully reflected by docket number 97-000369-CK. (Appellant's Appendix on Appeal, pages 10a-20a). ALLSTATE took the position that:

(1) There was no "occurrence" within the meaning of the applicable insurance policy.

(2) That, in addition, the conduct of ROBERT DANIEL McCARN was either intentional or criminal or both and that such conduct is specifically excluded under the plain terms of the policy.

A limited amount of discovery was conducted prior to a series of dispositive motions being filed.

B. CHARACTER OF PROCEEDINGS

By Motion filed on November 14, 1997, Defendants, ERNEST WARD McCARN and PATRICIA ANN McCARN, moved for Summary Disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10) (see Circuit Court Docket Entries, Appellant's Appendix on Appeal, page 1a). The Motion asserted that, as to Defendants, ERNEST WARD McCARN and PATRICIA ANN McCARN, the events of December 15, 1995,

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constituted an "occurrence" thereby invoking Plaintiff/Appellee, ALLSTATE INSURANCE COMPANY'S duty to defend and indemnify Defendants, ERNEST WARD McCARN and PATRICIA ANN McCARN, in the underlying tort action.

The Motion was heard on December 15, 1997 by Shiawassee Circuit Court Judge Gerald D. Lostracco (see December 15, 1997 Transcript of Hearing for Motion for Summary Disposition, Appellee's Appendix on Appeal, page 3b). At the hearing, the Trial Court granted Defendants, ERNEST WARD McCARN and PATRICIA ANN McCARN'S Motion for Summary Disposition, pursuant to MCR 2.116(C)(10), orally ruling that an "occurrence" occurred from the standpoint of Defendants, ERNEST WARD McCARN and PATRICIA ANN McCARN and that the intentional criminal act exclusion did not apply (see December 15, 1997 Transcript of Hearing for Motion for Summary Disposition, Appellee's Appendix on Appeal, pages 61b-63b). Judge Lostracco also found, for purposes of the Motion, that Defendant, ROBERT DANIEL McCARN, intentionally pointed the shotgun at KEVIN CHARLES LaBELLE, Deceased, and pulled the trigger, thereby striking and killing KEVIN LaBELLE at a time when ROBERT McCARN was residing on the premises of his grandparents (see December 15, 1997 Transcript of Hearing for Motion for Summary Disposition, Appellee's Appendix on Appeal, page 59b). However, Judge Lostracco did not determine whether or not Defendant, ROBERT DANIEL McCARN, was an insured person under the policy (see December 15, 1997 Transcript of Hearing for Motion for Summary Disposition, Appellee's Appendix on Appeal, page 63b).

Prior to the December 15, 1997 Motion hearing, Plaintiff/Appellee, ALLSTATE INSURANCE COMPANY, filed its Counter-Motion for Summary Disposition, pursuant to MCR 2.116(C)(9) and MCR 2.116(C)(10). The Motion asserted

that Defendant, ROBERT DANIEL McCARN, was an "insured person" as defined by the policy of insurance issued by Plaintiff/Appellee, ALLSTATE INSURANCE COMPANY, that the conduct of ROBERT McCARN on December 15, 1995 was criminal and/or intentional and that the events of December 15, 1995, did not constitute an occurrence.

The Motion was argued on February 6, 1998 (see February 6, 1998 Hearing on Motions Transcript, Appellant's Appendix on Appeal, page 95a). The Trial Court denied Plaintiff/Appellee's Motion, rejecting ALLSTATE'S argument that there was not an "occurrence" because KEVIN LaBELLE'S death was not the expected result of ROBERT McCARN'S pulling the trigger of the shotgun. The Trial Court also rejected Plaintiff/Appellee's argument that ROBERT McCARN'S actions on December 15, 1995 were intentional or criminal acts, based upon the subjective expectations ROEBERT McCARN had when he aimed the gun at KEVIN LaBELLE and pulled the trigger. Finally, the Trial Court rejected Plaintiff/Appellee's argument that ROBERT McCARN was an "insured person" as defined by the policy of insurance, based on the arguments during the December 15, 1997 Motion hearing and Plaintiff/Appellee's responses to discovery requests, particularly a denial of a Request for Admissions, dated October 23, 1997 (see February 6, 1998 Hearing on Motions Transcript, Appellant's Appendix on Appeal, pages 135a-138a).

Various attempts to have an Order entered which comported with Judge Lostracco's rulings during the December 15, 1997 and February 6, 1998 hearings were made and objected to (see Circuit Court Docket Entries, Appellant's Appendix on Appeal, page 1a). A hearing to settle the Order was held on April 27, 1998 (April 27, 1998 Transcript of Hearing on Motions, Appellee's Appendix on Appeal, page 65b). Following the hearing, an

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Order granting Defendants McCARNS' Motion for Partial Summary Disposition, denying Plaintiff/Appellee's Counter-Motion for Summary Disposition, and granting Summary Disposition in favor of all Defendants was signed by Judge Lostracco and entered on June 23, 1998 (see Order Granting Defendant McCarns' Motion for Partial Summary Disposition, Denying Plaintiff's Counter-Motion for Summary Disposition and Granting Summary Disposition in Favor of All Defendants, Appellant's Appendix on Appeal, page 141a).

Plaintiff/Appellee ALLSTATE INSURANCE COMPANY filed its Appeal of Right from the June 23, 1998 Order, specifically contesting the following rulings of the Trial Court:

> (1) That the events of December 15, 1995 which give rise to this Declaratory Judgment action and its companion case, Shiawassee County Circuit Court File No. 96-6030-NO, constitute an occurrence within the meaning of the ALLSTATE INSURANCE COMPANY policy of insurance number 006174947.
>
> (2) That there exists no genuine issue of material fact and therefore this Court determines that the conduct of ROBERT McCARN on December 15, 1995, was not intentional or criminal conduct from which it may reasonably be expected that bodily injury would result to KEVIN LaBELLE, within the meaning of the policy of insurance at issue.
>
> * * *
>
> (5) That ALLSTATE INSURANCE COMPANY owes a duty to defend and indemnify ERNEST, PATRICIA and ROBERT McCARN against those allegations asserted within Shiawassee County Circuit Court File No. 96-6030-NO for the reasons set forth on the record in the above hearings on this matter.

The Appeal was orally argued February 9, 2000 and the Court of Appeals issued its Opinion, reversing the Trial Court and remanding with instructions to enter

Judgment in favor of ALLSTATE INSURANCE COMPANY. (Opinion of the Court of Appeals - October 3, 2000, Appellant's Appendix on Appeal, page 144a). Appellant NANCY LaBELLE filed her Motion for Reconsideration which was denied. Appellant NANCY LaBELLE then filed Application for Leave to Appeal to this Honorable Court. Leave to Appeal was granted June 27, 2001.

This matter was Orally Argued on December 5, 2001. This Court issued its Opinion on June 12, 2002. (Allstate Insurance Company v McCarn, 466 Mich 277 [2002]). Re-hearing was denied on July 23, 2002. (McCarn, supra. at Page 1222).

Pursuant to this Court's Order, this matter was remanded to the Michigan Court of Appeals for consideration of the applicability of the "intentional or criminal acts" policy exclusion. The Court of Appeals' unpublished decision was issued November 15, 2002. The Court of Appeals ruled that the conduct of ROBERT McCARN by intentionally pointing a gun at the face of KEVIN LaBELLE and pulling the trigger was a criminal act, and that ROBERT McCARN could reasonably expect that his criminal act would result in an injury to KEVIN LaBELLE. Therefore, the Court of Appeals concluded that the "intentional or criminal acts" exclusion of the insurance policy applied and that ALLSTATE INSURANCE COMPANY was relieved of its obligation to defend and/or indemnify its insureds. The Court of Appeals further reversed the Trial Court's grant of summary disposition in favor of Defendant and remanded the case to the Shiawassee County Circuit Court for entry of Judgment in favor of Plaintiff, ALLSTATE INSURANCE COMPANY. (Opinion of the Court of Appeals On Remand November 15, 2002, Appellant's Appendix Page 203a).

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Appellant then filed Application for Leave to Appeal which was ultimately granted by this Court on November 6, 2003.

C. SUBSTANCE OF PROOF

At the time of ROBERT McCARN'S deposition on December 2, 1996, the following exchanges occurred, which clearly documented intentional and criminal conduct on his behalf:

Q. And what do you have to do to actually fire this gun?

A. Pull the trigger back.

Q. The trigger or the hammer?

A. The hammer.

***

Q. So to fire this gun, you have to pull back on the hammer?

A. Yes.

Q. And then, what do you do?

A. Pull the trigger.

***

Q. So if I understood your testimony on how to make this gun fire, the first thing you need to do is, assuming there's a shell in it, you have to pull the hammer back?

A. Yes.

Q. If the hammer is all the way forward and you pull the trigger will the gun fire?

A. No. (Deposition of Robert McCarn, Appellant's Appendix on Appeal, pages 43a-44a).

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***

Q. And then, after doing that, what was the next thing that you did?

A. I remember that he wanted to see my .410 shotgun.

Q. Kevin wanted to see your gun?

A. Yeah, we talked about it.

Q. He knew from previous conversation with you that you had a gun?

A. Yes.

Q. And you had described it to him?

A. Yes.

Q. And he wanted to see it?

A. Yes.

Q. Did you tell him you were permitted to get it out?

A. No.

Q. Did you immediately get it out for him?

A. Yes.

Q. And you showed it to him?

A. Yes.

Q. Did he handle it?

A. Yes.

Q. At any point in time did you tell him that it was loaded?

A. No.

Q. After Kevin handled the gun, did you handle it?

A. Yes.

Q. And did you point that gun at Kevin

A. Yes.

Q. Kevin had not pointed it at you?

A. No.

Q. And when you pointed the gun at Kevin, you believed the gun was not loaded?

A. Yes.

Q. And during the process of pointing the gun at Kevin, you pulled the trigger?

A. Yes.

Q. You didn't intend for the gun to fire?

A. No.

Q. Where were you pointing the gun? Where on his body were you pointing the gun when you did that?

A. At his face.

Q. Were you saying anything to him at the time?

A. No.

Q. How far was he from you when you did that?

A. About a foot. (Deposition of Robert McCarn, Appellant's Appendix on Appeal, pages 58a-60a) (emphasis supplied)

***

Q. And how did you come to pull the trigger? Were you trying to pretend like you were going to pull the trigger and then you just continued the motion and didn't hesitate?

A. I just pulled, thinking it would click.

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Q. So you actually intended to pull the trigger, but you thought the gun was unloaded?

A. Yes.

Q. You thought it would make a clicking sound?

A. Yes.

Q. Thought that that would be frightening to Kevin?

A. Yeah.

***

Q. When you handled the gun, at some point in time, did you pull the hammer back?

A. Yes. (Deposition of Robert McCarn, Appellant's Appendix on Appeal, pages 61a-62a) (emphasis supplied)

***

Q. And is that the point in time when you then pointed the shot gun at him?

A. Yes.

***

Q. You were attempting to frighten him into giving you the crackers?

A. Yes. (Deposition of Robert McCarn, Appellant's Appendix on Appeal, page 66a) (emphasis supplied)

***

Q. You were the one that pulled the trigger?

A. Yes.

Q. It was your gun?

A. Yes.

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Q. You got the gun out?

A. Yes.

Q. You knew you weren't supposed to get the gun out?

A. Yes. (Deposition of Robert McCarn, Appellant's Appendix on Appeal, page 73a).

To recapitulate, the testimony of ROBERT McCARN clearly establishes that the following intentional and criminal acts occurred prior to the discharge of the shotgun:

(1) Contrary to his grandparents' instructions, he had a friend over when his grandparents were not present.

(2) He smoked marijuana with KEVIN LaBELLE immediately before the shooting.

(3) Contrary to instructions from his grandparents, he removed the gun from under his grandfather's bed.

(4) He became involved in an argument with KEVIN LaBELLE over crackers.

(5) When KEVIN LaBELLE refused to give him the crackers, ROBERT McCARN intentionally pointed the gun at KEVIN LaBELLE's face.

(6) He then intentionally pulled the hammer back.

(7) He then intentionally pulled the trigger.

The Trial Court, ignoring the clear language of the policy, ruled that the conduct of ROBERT McCARN as outlined above, did not constitute a criminal or intentional act within the meaning of the Allstate exclusion. The Court further ruled that the "shooting death was not the expected result of pulling the trigger of what the shooter thought to be an unloaded gun. (Appellant's Appendix on Appeal, page 136a).

The Trial Court also failed to distinguish the ultimate harm which occurred by virtue of the intentional and criminal conduct of ROBERT McCARN (i.e. the death of KEVIN LaBELLE) from the harm which ROBERT McCarn admitted that he intended to cause. (i.e. scaring KEVIN LaBELLE into giving him the crackers by pointing a weapon at his face.

In other words, the Trial Court did not consider the remainder of the exclusion which would also obviate coverage if the bodily injury intended or reasonably expected "is of a different kind or degree than intended or reasonably expected. (Allstate Insurance Policy Exclusion 1(b), Appellant's Appendix on Appeal, page 190a).

There is no question that ROBERT McCARN assaulted KEVIN LaBELLE, that he did so feloniously and that the assault culminated in manslaughter for which ROBERT McCARN was convicted.

On remand, the Court of Appeals specifically held, as stated in its previous Opinion, that "firearms, by their very nature, have an incredible power to injure and kill. Intentionally aiming a firearm at another person and pulling the trigger is an unconscionable abuse of this power. A person should reasonably expect that it is highly likely that injury or death will result from such actions". (Opinion of the Court of Appeals on Remand, November 15, 2002, Appellant's Appendix on Appeal, page 206a). Therefore, the Court of Appeals held that ROBERT McCARN engaged in intentional and criminal conduct at the time he discharged the shotgun in the direction of KEVIN LaBELLE and that a reasonable person, under the circumstances, would expect bodily injury to occur.

It is from the Court of Appeals decision on Remand that the present Appeal arises.

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D. IMPORTANT INSTRUMENTS RELEVANT TO THIS APPEAL

Given this Court's prior Opinion in McCarn, supra., the issue to be decided in this Appeal is now limited to whether or not the "intentional or criminal acts" exclusion obviates coverage for the conduct of ROBERT McCARN. The policy at issue provides:

> *Losses We Do Not Cover Under Coverage X:*
>
> 1. We do not cover any **bodily injury** *** intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any **insured person.** This exclusion applies even if:
>
> a) such **insured person** lacks the mental capacity to govern his or her conduct;
> b) such **bodily injury** *** is of a different kind or degree than intended or reasonably expected; or
> c) such **bodily injury** *** is sustained by a different person than intended or reasonably expected.
>
> This exclusion applies regardless of whether or not such **insured person** is actually charged with, or convicted of a crime. (Emphasis supplied).

(Allstate Deluxe Homeowners Insurance Policy, Appellant's Appendix on Appeal, page 190a).

Appellee suggests that the conduct of ROBERT McCARN was both intentional and criminal. He testified at deposition that he intentionally went through a series of steps which culminated with the intentional pulling of the trigger of the shotgun

while aiming it at another human being. In addition to intentionally performing this series of maneuvers, the conduct is also criminal by virtue of MCL 750.329 which prohibits pointing a weapon at a person, should death ensue thereafter. Additionally, the conduct of ROBERT McCARN constitutes an assault as defined by MCL 750.81 and, as noted by Justice Young in his dissenting Opinion in McCarn, supra., felonious assault as defined by MCL 750.82 as well as simple assault as defined by MCL 750.81.

The Exclusion also provides that it is immaterial as to whether the insured intended to cause the precise harm which resulted (i.e. in this case, death) inasmuch as the exclusion specifically applies to any bodily injury intended by the insured, or which may reasonably be expected to result from the intentional or criminal acts or omissions of the insured, even if such bodily injury is of a different kind or degree than intended or reasonably expected. There is no question that ROBERT McCARN did intend to frighten KEVIN LaBELLE into returning the crackers immediately prior to ROBERT McCARN aiming the gun at KEVIN LaBELLE and pulling the trigger. Furthermore, the Court is to examine at the conduct of the insured in order to determine whether or not such conduct is criminal in nature, whether or not the insured is actually convicted of or charged with a crime.

Given the fact that the Court of Appeals reversed the Trial Court's ruling that there was an "occurrence" within the meaning of the policy during the original appeal, the issue of the applicability of the Exclusion was never decided. The Court of Appeals on remand, in its November 15, 2002 unpublished Opinion, reversed the Trial Court's erroneous ruling that the conduct of ROBERT McCARN did not constitute an intentional or criminal act and that some degree of harm could be reasonably expected by a reasonable

person. This is the issue now on appeal to this Honorable Court.

E. THE RULING OF THE COURT OF APPEALS

As noted above, this Court remanded to the Court of Appeals the issue as to whether or not ROBERT McCARN's actions constituted a criminal or intentional act that, under the policy's criminal or intentional act exclusion, negates Allstate's duty to indemnify the insureds. The Court of Appeals issued its unpublished Opinion November 15, 2002, concluding that, in fact, the conduct of ROBERT McCARN was criminal and intentional and that a reasonable person should reasonably expect that it would be highly likely that injury or death would result from such actions. Therefore, the Court of Appeals ruled that the criminal or intentional acts exclusion to the insurance policy applied and that Allstate was relieved of its obligation to defend its insureds. The Court of Appeals reversed the Trial Court's grant of summary disposition in favor of Defendants and remanded for entry of Judgment in favor of ALLSTATE INSURANCE COMPANY.

A dissenting Opinion by Judge White concluded that a question of fact regarding the reasonable expectation of injury existed and, thus, she would remand to the Trial Court for further proceedings. (Opinion of the Court of Appeals on Remand, November 15, 2002, Appellant's Appendix on Appeal, page 203a).

ARGUMENT

I. WHETHER THE BODILY INJURY SUSTAINED BY KEVIN CHARLES LaBELLE WAS CAUSED BY THE INTENTIONAL OR CRIMINAL CONDUCT OF ROBERT DANIEL McCARN.

The Trial Court answered, "No".

The Court of Appeals, on Remand, answered, "Yes".

Appellee Allstate Insurance Company contends the answer should be, "Yes".

Appellant LaBelle contends that the answer should be, "No".

The policy of insurance issued by ALLSTATE INSURANCE COMPANY to ERNEST and PATRICIA McCARN provides coverage for bodily injury arising from an "occurrence to which this policy applies, and is covered by this part of the policy. . .".

This Court has previously ruled that the intentional aiming of a weapon at another human being and pulling the trigger without having ensured the gun was unloaded is, in fact, an "occurrence" within the meaning of the Allstate policy, given ROBERT McCARN's claim that he did not know the weapon was loaded.

In fact, this Court, when looking at the existence of an occurrence, adopted a subjective analysis in determining whether or not the consequences of the insured's actions should have been reasonably expected by the insured. (McCarn, supra. at Pages 286-287).

This Court did not, however, adopt a subjective analysis for purposes of determining the applicability of policy exclusion. Furthermore, contrary to the assertions by Appellant, this Court did not determine that there was "coverage" for the shooting death of KEVIN LaBELLE. To the contrary, the sole issue decided by this Court was that, at least from ROBERT McCARN's perspective, an "accident" had occurred.

The Court of Appeals on remand correctly noted:

> The exclusionary clause in this case is similar to the exclusionary clause in Allstate Insurance Company v Freeman, 432 Mich 656, 685; 443 NW 2d 734 (1989). Freeman establishes a two prong test that may be applied to the exclusionary clause at issue in this case. Such an exclusionary clause relieves the insurer of liability if '(1) the insured acted *either* intentionally or *criminally*, and (2) the resulting injuries occurred as the natural, foreseeable, expected, and anticipated result of an insured's intentional or criminal acts.' Id. at 660 (Emphasis in the original).

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In fact, this Court has repeatedly held that the "reasonably expected to result" language implies a standard of reasonableness, or an objective standard, not the insured's subjective intent. See, for example Buczkowski v Allstate Insurance Company, 447 Mich 669, 673 (Brickley, J.), 682-684 (Boyle, J.) (1984).

As indicated above, the conduct of ROBERT McCARN was both intentional and criminal. He testified at deposition that he intentionally went through a series of acts which culminated in the intentional pulling of the trigger of the shotgun while aiming it at another human being. In addition to intentionally performing this series of maneuvers, the conduct is also criminal.

It is important for this Court to note that the exclusion provides that it is immaterial as to whether the insured intended to cause the precise harm which resulted. (i.e. in this case, death). In fact, the exclusion specifically provides that coverage is obviated even if "such bodily injury. . . is of a different kind or degree then intended or reasonably expected. . .". Again, the insured need not be convicted of a crime, as long as the conduct is criminal in nature.

A similar exclusion was construed in the Court of Appeals case of Allstate Insurance Company v Fick, 226 Mich App 197 (1997). Among other things, the Court found that the criminal acts exclusion was unambiguous insofar as it clearly precluded coverage for bodily injury resulting from a criminal act. Much like the present case, the insured in Fick argued that the bodily injury which she caused (death of her son's girlfriend) was an "accident" and therefore included within the coverage grant of the policy.

The Fick Court examined the Colorado Court of Appeals Decision in Allstate Insurance Company v Juniel, 931 P 2d 511, 515 (Colo. App, 1996). The Fick

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Court noted that the Allstate exclusion in Juniel was identical to the one before it and held that the exclusion:

> ". . . eliminates from coverage more than just intentional crimes or injuries intended or reasonably expected."

Likewise, from an objective standpoint, given Kabalka's admission that she engaged in a criminal act and the all-encompassing criminal acts exclusion at issue, the Michigan Court of Appeals held that the insured could not reasonably have expected coverage under the circumstances. Also see Allstate Insurance Company v Keillor, (After Remand), 450 Mich 412, 420 (1995). Therefore, the Court concluded that Allstate had no duty to defend or indemnify Nancy Kabalka in the underlying action.

In other words, the Fick Court held that the precise harm which resulted from the criminal act need not be actually intended by the insured in order for the exclusion to apply.

Defendant, ROBERT DANIEL McCARN, pled no contest to a violation of MCL 750.329 in the Shiawassee County Probate Court on May 16, 1996. This Court did recognize, in footnote 7, that the Nolo Contendre plea to manslaughter does not have the effect of an admission for any other proceeding than the one in which it is entered. However, the Allstate policy does, in fact, exclude coverage "regardless of whether or not such insured person is actually charged with, or convicted of a crime. As such, all that is needed to invoke the exclusion is conduct which is either intentional or criminal in nature. In other words, a conviction is not a prerequisite to excluding coverage.

In actuality, the conduct of ROBERT McCARN has several elements of criminality.

ROBERT McCARN testified during his deposition that it was his intent to scare KEVIN LaBELLE into returning the crackers by pointing the gun at him and pulling the trigger. At that point, at a minimum, he committed the criminal offense of assault and, as Justice Young noted in his dissent, the criminal offense of felonious assault. Furthermore, in order to prove the offense of manslaughter committed by aiming or pointing a firearm intentionally, but without malice, the following elements need be established:

(1) Death;

(2) That the death was caused by an action of the Defendant;

(3) That the Defendant caused the death without lawful justification or excuse;

(4) That the death resulted from the discharge of a firearm;

(5) That at the time of such discharge, the Defendant was pointing or aiming the firearm at the Decedent.

(6) That at the time of such discharge, the Defendant intended to point or aim the firearm at the Decedent.

The only proof necessary to support such an offense is that the Defendant intentionally pointed a gun at the Decedent and that the Decedent died as a result of the subsequent discharge of the firearm. The Prosecutor need not establish that the Defendant acted with gross negligence or willful or wanton conduct to support such a charge (People v Duggan, 115 Mich App 269 [1982]).

In People v Maghzal, 170 Mich App 340 (1988), the Defendant was convicted of second degree murder and possession of a firearm during the commission of a felony. Defendant and the Decedent had been married for four months at the time of his

death. This shooting took place on December 19, 1984 at Defendant's home. According to a statement given by Defendant to the police, Decedent had returned home from work late, took a shower and went to sleep in the guest bedroom. Defendant was writing Christmas cards in the master bedroom. The Defendant later went in to get Decedent but he indicated that he would sleep in the guestroom because he had already set the alarm in that room. The two began to joke, according to Defendant, and Decedent said that he wanted to die. She asked him if he would like her to shoot him and he said, yes. She then went to her brother's bedroom and got a .25 caliber automatic weapon. According to the Defendant, she asked her husband whether the safety was on, took out the clip and told him it was dangerous to point the gun at anyone. She placed the gun to Decedent's right temple and the gun went off. The Defendant told officers that she and her husband were joking and she did not think the gun was loaded.

In discussing the statutory felony of manslaughter committed by aiming or pointing a firearm intentionally, but without malice, the Court of Appeals noted:

> We believe that the legislative intent was to punish the intentional pointing of a firearm which results in death even if the defendant did not act in a grossly negligent manner. (citations omitted)

The Court indicated that when a person points a gun at someone as a joke, reasonably believing the gun not to be loaded, and pulls the trigger and the gun discharges and kills the victim, he is guilty of manslaughter.

ROBERT McCARN admitted that he did intend to point the gun at KEVIN LaBELLE and pull the trigger. He indicated that he was trying to scare him. The criminal statute does not require any intent to injure. To the contrary, a violation of the statute is proven simply by showing that the individual intentionally pointed a firearm at

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someone and that death ensued.

In People v Khoury, 181 Mich App 320 (1989), Defendant was convicted of statutory manslaughter, i.e. death from a firearm pointed intentionally but without malice.

Defendant was an on-duty uniformed Romulus police officer. He was dispatched in a marked police car to an apartment complex at which a fight was reported to be in progress. When he arrived, two persons were fighting each other. Defendant took out his gun and approached one of the participants from behind. Defendant cocked the gun, then touched Decedent's temple with the gun. When Decedent moved his head and upper body away from Defendant, the gun discharged. As noted above, Defendant was convicted in the Trial Court. On Appeal, he contended that there was insufficient evidence that the death resulted without lawful justification or excuse.

Once again, to support a conviction for statutory manslaughter, it is necessary only that the prosecution show that Defendant intentionally pointed a firearm at Decedent and that the Decedent died as a result of the subsequent discharge of the firearm.

The Court of Appeals noted:

> Here, defendant admitted that he aimed the gun at Hester's head, and has never claimed that the pointing of the gun at Hester was other than intentional. Viewed in a light most favorable to the prosecution, the prosecution introduced evidence sufficient to justify a rational trier of fact in finding that Hester's death resulted without lawful excuse. (Khoury, at page 324) (emphasis in the original)

ROBERT McCARN admitted that he pointed the gun at KEVIN LaBELLE, that he pulled the hammer back and that he intentionally pulled the trigger. Albeit, he thought the gun was unloaded. However, knowledge of whether or not the gun was loaded is not an element required to prove statutory manslaughter.

The insuring agreement of the Allstate policy explicitly provides that payment of damages arising from an accident is subject to the terms and conditions of the policy, including its exclusions. Thus, the policy language is clear that not all injuries arising from accidents will be covered. In fact, Michigan Courts have held that an insurance policy that excludes coverage for a person's criminal acts serves to deter crime, while a policy that provides benefits to those who commit crimes would encourage it. Auto Club Group Insurance Company v Daniel, et al., 254 Mich App 1 (2002).

As Appellee pointed out in its original Brief, it would be dangerous precedent for this State to establish a policy whereby an individual could avail himself of liability insurance by simply claiming that he or she didn't know the gun was loaded. Certainly, this Court has previously recognized that intent to harm is not a prerequisite to the application of an Exclusion in an insurance policy as long as, from an objective standpoint, injury could reasonably be expected. Frankenmuth Mutual Insurance Company v Masters, 460 Mich 105 (1999); Nabozny v Burkhardt, 461 Mich 471 (2000).

It is clear from the foregoing that ROBERT McCARN's conduct was both intentional and criminal.

II. WHETHER THE BODILY INJURY SUSTAINED BY KEVIN CHARLES LaBELLE COULD REASONABLY BE EXPECTED TO RESULT FROM THE INTENTIONAL OR CRIMINAL CONDUCT OF ROBERT DANIEL McCARN.

The Trial Court answered, "No".

The Court of Appeals answered, "Yes".

Appellee Allstate contends that the answer should be, "Yes".

Appellant LaBelle contends that the answer should be, "No".

The question then becomes whether or not a reasonable person, from an

objective perspective, could reasonably expect that injury might occur as a result of that person's conduct.

Again, it is important for this Court to focus on the different perspective used in analyzing whether an occurrence occurred. (i.e. a subjective analysis) versus the determination of whether or not an exclusion applies. (i.e. an objective analysis).

As the Court of Appeals recognized in its October 3, 2000 Opinion:

> Because firearms, by their very nature, have an incredible power to injure and kill, aiming one at another human being and pulling the trigger, under any circumstances, in our view, is unconscionable. When harm results from such an event, it necessarily must be within the parameters of what reasonable people must reasonably expect. . . (Emphasis supplied).

In such regard, Attorney James Dalton, Attorney for PATRICIA and ERNEST McCARN, during the February 6, 1998 hearing stated:

> . . . and certainly, your Honor, I would expect if you and I, and Mr. Donovan, and Mr. Collison were in a room with a shotgun sitting on a table, we would all treat that gun as a loaded gun, I mean we heard that I don't know how many times, you know, you treat every gun as a loaded gun. . . (Appellant's Appendix on Appeal, pages 111a).

Appellee asserts that no reasonable person would pick up a gun, not knowing for certain whether it was loaded or not, pull the hammer back, point it at another human being and pull the trigger. To say that injury under the circumstances could not be reasonably expected would eviscerate the concept of reasonableness by simply pleading ignorance.

In addition, the legislature of the State of Michigan has made the public policy determination that intentionally aiming a firearm at an individual presents such a probable degree of harm that it enacted MCL 750.329 which provides:

A person who shall wound, maim or injure any other person by the

> discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter.[1]

By enacting these statutes, the Legislature recognized that there is a substantial probability that injuries will occur when a firearm is aimed at an individual and that criminal sanctions in such circumstances are appropriate.

Guns are dangerous simply by virtue of the fact that they are weapons. Weapons are designed to kill things. Weapons are designed to hurt things. Gun manufacturers recognize the dangers associated with weapons by providing a safety in an attempt to avoid accidental discharge.

Youngsters are required to undergo gun safety training before being issued a license to hunt. A person seeking a concealed weapons permit is required to undergo gun safety training as a condition of issuance of such a permit.

The dangers associated with a gun are so universally recognized that it is a crime simply to point a gun, loaded or not, at another individual.

Appellee suggests that the foreseeability of harm increases directly in proportion to the dangerousness of the instrumentality. The greater the risk inherent in the instrument, the more likely that someone will be injured.

The test then is one of reasonable expectation of injury without reference to the insured's subjective state of mind.

As stated by Justice Riley in the Freeman case:

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[1] As indicated earlier, the conduct would also constitute a simple assault, felonious assault and,Appellee contends, the violation of MCL 750.233 (intentionally aiming a firearm without malice), MCL 750.234 (discharge of a firearm intentionally but without malice, MCL 750.234(b) (discharge of a firearm in a dwelling) and, most importantly, MCL 750.237 (possession of a firearm when under the influence of a controlled substance).

> An insurer may obviate its duty to defend and indemnify under the exclusion. . . if the resulting injury was the natural, foreseeable, expected, and anticipated result of the intentional or criminal conduct. (Freeman, supra., at Page 688).

The Freeman Court noted that "expected" required a lesser degree of proof than "intended".

As stated in Maghzal, supra:

> Anyone with that level of knowledge or experience to know how to remove the clip from the weapon would also have to know how to operate the safety and would know not to press a gun loaded or unloaded with the safety on or off, with the clip in or out, against someone's head and pull the trigger.*** (Emphasis supplied). (At Pages 346-347).

The foregoing is offered in order to reaffirm the fact that Michigan Courts, for many, many years, have implicitly recognized the inherent dangerousness of firearms and the fact that handling a weapon with such indifference as ROBERT McCARN raises the foreseeability and expectation that harm could occur to a substantial probability.

ROBERT McCARN was familiar with the safe operation of weapons. In his deposition, the following exchanges occurred:

Q. Had you ever taken any classes in gun safety before you received that gun as a gift?

A. Yes.

Q. Where did you take any classes in gun safety?

A. Holt Junior High.

Q. Do you remember when you attended the class at Holt Junior High?

A. Eighth grade.

Q. As of the time you were in eighth grade, had you had experience operating any other kind of a gun?

A. No.

Q. Was this class taken during the regular school day or after the regular school hours?

A. During regular school.

Q. Was it a part of some other class or was it a class that was intended just to teach gun safety?

A. Just one class.

Q. How long did that class last?

A. An hour.

Q. And for what period of time, days or weeks?

A. Weeks.

Q. Did you receive any kind of a certificate or anything that showed that you had successfully completed that class?

A. Yes.

Q. Do you still have that available to you? Do you know where that is?

A. Yes.

Q. Where is it?

A. At home.

Q. Did you decide that that was a class that you wanted to take or did someone in your family recommend that you take it?

A. It was a class I wanted to take.

Q. And did you learn in that class that the safe handling of a gun would require that you not point a weapon at another person?

A. Yes.

***

(Deposition of Robert McCarn, Appellant's Appendix on Appeal, pages 33a-34a)

From the foregoing, it is evident that ROBERT McCARN knew better than to retrieve a gun, loaded or unloaded, with or without the safety on, with a shell in or out of the chamber and point it at someone while pulling the hammer back and then pulling the trigger.

More than 100 years ago, this Court recognized the high probability of injury when handling firearms in the case of Bahel v Manning, 112 Mich 24 (1897). Bahel involved the reckless discharge of a firearm, without intent. Michigan had adopted, at that time, a statute which allowed recovery in a civil suit by any party maimed or wounded by the discharge of a firearm. In construing the statute, the Court held:

> The general rule, and without reference to the statute, is that a very high degree of care is required from all persons using firearms in the immediate vicinity of others, no matter how lawful or even necessary such use may be. .
> .

Bahel dealt with a situation where Defendant subjectively believed the gun was unloaded as well.

In Freeman, supra., this Court held that injury is reasonably expected when it occurs as the natural, foreseeable, expected and anticipated result of the criminal act. Freeman, supra. at 660, 687-688. Furthermore, the Freeman Court held that an exclusionary clause, such as the one in this case, which contains the words "may reasonably be expected", is evaluated using an objective standard. Id. at 660, 688. In the companion case to Freeman, Justice Riley explained that the word "expected" in an exclusionary clause of an insurance policy means that the insured knew or should have known that there was a substantial probability that certain consequences would result from his actions. Id. at 675.

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The difference between "reasonably foreseeable" and "substantial probability" was held to be the degree of expectability.

In order to be "reasonably expected" there must be indications strong enough to alert a reasonably prudent man not only to the possibility of harm occurring, but the indications must also be sufficient to forewarn him that results are highly likely to occur.

As the Court of Appeals, on Remand, concluded:

> . . . a person who points a gun at another person's face and intentionally pulls the trigger without checking to see whether the gun is loaded can reasonably expect that injury will result. . . (Emphasis supplied).

Appellee submits that no reasonable person would ever point a gun at another human being and pull the trigger without first, at a minimum, checking to make sure that the gun was unloaded. Although ROBERT McCARN may have subjectively believed that the gun was not loaded, his subjective beliefs have nothing to do with the objective analysis required when examining the applicability of the insurance policy exclusion.

The majority opinion in McCarn, supra., focused exclusively on the fact that ROBERT McCARN did not intend to shoot KEVIN LaBELLE. This may or may not be true, given ROBERT McCARN's subjective indications that he thought the gun was unloaded. However, it cannot be said that ROBERT McCARN did not intent to harm KEVIN LaBELLE.

By ROBERT McCARN's own admission, he, at a minimum, intended to scare KEVIN LaBELLE into returning the crackers by pointing a gun at him. This constitutes an assault. Michigan has long recognized a civil cause of action for assault as evidenced by Michigan Civil Jury Instruction 115.01, which defines assault as follows:

> An assault is any intentional, unlawful threat or offer to do bodily injury to another by force, under circumstances which create a well-founded fear of imminent peril, coupled with the apparent present ability to carry out the act if not prevented. (Emphasis supplied).

There is no question that ROBERT McCARN's conduct was both intentional and unlawful and constituted an assault, as he threatened KEVIN LaBELLE. The Allstate policy specifically obviates coverage for any harm reasonably to be expected to result from the intentional or criminal acts or omissions of an insured person, even if such bodily injury is of a different kind or degree than that intended or reasonably expected. To say that ROBERT McCARN did not intend to harm KEVIN LaBELLE is disingenuous. He intended to and, in fact, did assault his friend. In addition to being criminally responsible, he could be found to be civilly responsible for money damages. The fact that the magnitude of the harm was not anticipated subjectively by ROBERT McCARN is insignificant in that the triggering event is causing any harm to another. See also Tinkler v Richter, 295 Mich 396 (1940).

As noted above, this Court ruled previously that the discharge of the shotgun was an accident and "entitled to coverage unless a policy exclusion applies". (McCarn, at Page 291). The exclusion at issue activates when there is the convergence of criminal or intentional conduct and a reasonable expectation of injury.

As noted in Allstate Insurance Company v Freeman, 432 Mich 656 (1989), some acts are so nearly certain to produce injury that intent or expectation to injure should be inferred as a matter of law. The reckless indifference with which ROBERT McCARN handled this firearm is just such an act. Reasonable people, whose perspective is used in association with the objective analysis of the applicability of the exclusion, would never point a gun at another human being and pull the trigger whether or not they believed it to be

loaded. The conduct of ROBERT McCARN on December 15, 1995 was willful, wanton, intentional and criminal. His conduct went beyond mere negligence. As Justice Young noted in Footnote 13 of McCarn, supra., "this would be a much closer question - - and one requiring a Trial - - if evidence were presented that the insured had checked the gun and mistakenly (or negligently) determined that it was unloaded before pulling the trigger."

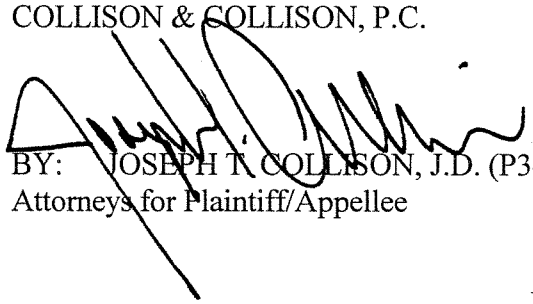
Given the totality of the circumstances, a reasonable person should have expected a likelihood of injury under the circumstances. As such, the conduct of ROBERT McCARN is excluded under the Allstate policy.

PRAYER FOR RELIEF

Plaintiff/Appellee, ALLSTATE INSURANCE COMPANY, respectfully requests that this Honorable Court affirm the decision of the Court of appeals dated November 15, 2002.

Dated this 20th day of January, A.D., 2004.

COLLISON & COLLISON, P.C.



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